Supreme Court, U.S.
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No. _____

# In The
# Supreme Court of the United States

Ronald G. Harris,
Susette M. Harris, Petitioners
v.
United States of America

On Petition for Writ of Certiorari to the United States Court of Appeals to the Fifth Circuit

## Petition for Writ of Certiorari

Petitioners:
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20pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does the plain language of 26 USC §6103 preclude distinguishing between return information in the public record that is recorded on an Internal Revenue agency document and return information recorded on a non-Internal Revenue agency document and if so, bars disclosure of return information to the press regardless of the source?

The public record contains return information. Some return information is publicly recorded on official Internal Revenue documents such as a notice of tax lien. Other return information is recorded in the public record on non-Internal Revenue documents such as real property record filings (assets and liabilities), judgments (income owed or due), and security instruments.

Thus, the public record is composed of two sources of return information: Internal Revenue documents and non-Internal Revenue documents.

The Fifth Circuit and the Seventh Circuit have concluded that if a disclosure to the press is based upon a non-Internal Revenue document in the public record such as a judgment or court proceedings, then the disclosure is authorized even though not based upon one of the exceptions enumerated in 26 U.S.C. §6103.

2. Is the good faith defense pursuant to 26 U.S.C. §7341(b) jurisdictional and therefore not subject to the rules of notice pleading and Rule 8(c) of the Federal Rules of Civil Procedure?

The government has waived sovereign immunity for unexcepted disclosures of return information. The government codified that no liability shall arise from a disclosure "which results from a good faith but erroneous interpretation of section 6103." Good faith is similar to qualified immunity available to public officials.

The Fifth Circuit Court of Appeals ruled that a defense of good faith under Section 7431(b) is jurisdictional and can be raised at any time by the United States or by the Court *sua sponte*.

## PARTIES TO THE PROCEEDING

Petitioners:

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*Ronald G. Harris, Susette M. Harris v. United State of America*, NO. 01-20543, On Petition for Rehearing (5th Cir. July 1, 2002)

## STATEMENT OF JURISDICTION

*SEE REFORMATTED SEPARATE APPENDIX*

The district court entered its opinion and final judgment on April 2, 2001.

A Fifth circuit panel entered its opinion on April 17, 2002 and petition for rehearing was denied on July 1, 2002.

Jurisdiction for this petition is found at 28 USC §2101(c).

## RELEVANT STATUTES

See appendix included in this petition.

PETITION FOR WRIT OF CERTORIARI

CONCISE STATEMENT OF THE CASE

QUESTION 1

The basis for district court jurisdiction was under authority of 28 USC §7431(a)(1).

The following material, undisputed facts are related to the disclosure of the Harrises' amount of their tax liability to a newspaper reporter after the federal tax auction of their principal residence.

The disclosure occurred at the Montgomery County Courthouse, Conroe, Texas.

The Harrises' principal residence was subject to auction for their federal tax liabilities. 26 USC §6335. The seizure and sale of the Harrises' residence was a not forfeiture under the Internal Revenue laws or any other laws.

Revenue Officer Carabeth Luckey, the officer in charge of the Collectibility investigation and the auction, told a newspaper reporter Geoff Drushell that the Harrises owed "hundreds of thousands of dollars in taxes for a five year period beginning in 1978." This statement was made after the sale of the Harrises' principal residence and not in connection with any tax administration as defined under 26 USC §6103(b)(4).

Luckey testified later that when she made this statement she was referring to the federal judgment that was filed in the Montgomery County Courthouse. This judgment, *United States v. Harris*, H-89-CV-2543 (USDC S.D. TX, 1992), reduced to judgment the Harrises' federal income tax liabilities for 1978 through 1982. The amount

of the Harrises' tax liabilities in the judgment totaled $212,747.42.

In that same courthouse were notices of federal tax lien-Form 668(Y) filed against the Harrises by Officer Luckey. Luckey filed theses notices of federal tax lien the Friday before the auction on Tuesday. Those notices specified the amount of the Harrises' tax liability for those same tax years referred to by Luckey in her statement to the reporter.

Luckey's statement that the Harrises owed "hundreds of thousands of dollars in taxes" was published the next day in the Conroe Courier, a local newspaper.

The Harrises sued for unauthorized disclosure.

Officer Luckey defended on the basis that the disclōsure was in the public record and therefore not confidential relying on *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997). Luckey did not defend on the basis that her disclosure was excepted under Section 6103.

## QUESTION 2

The Harrises timely filed a complaint for unauthorized disclosure by Revenue Officer Carabeth Luckey. The United States filed a timely answer. In that answer the United States did not preserve a good faith defense pursuant to Section 7431(b). The United States' amended answer again did not preserve good faith.

The Harrises proceeded through discovery based upon the defenses asserted in the United States' answer.

After the conclusion of discovery, the United States raised good faith for the first time in its Motion for Summary Judgment. The district court found the applicable Internal Revenue manual procedure provided a good faith basis for an erroneous interpretation.

## ARGUMENT

### QUESTION 1

The basis for the petition is found at Rule 10(a) of the Supreme Court Rules.

The decision of the Fifth Circuit conflicts with the decisions of the Fourth circuit in *Mallas v. U.S.*, 993 F.2d 1111 (4th Cir. 1993), the Sixth circuit in *Rowley v. United States*, 76 F.3d 796 (6th Cir.1996), the Ninth circuit in *Lampert v. U.S.*, 854 F.2d 335, 338 (9th Cir. 1988), cert. denied 490 U.S. 1034 (1989) followed by *William E. Schrambling Accountancy Corp. v. United States*, 937 F.2d 1485, 1489 (9th Cir. 1991), cert. denied. 502 U.S. 1066 (1992), and the Tenth circuit in *Rodgers v. Hyatt*, 697 F.2d 899, 904 (10th Cir. 1983) distinguished by *Rice v. U.S.*, 1999 U.S. App. LEXIS 1122, 99-1 U.S.C. ¶ 50224 (10th Cir. 1999).

The decision is in accord with the Fifth circuit in *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997) and the Seventh circuit in *Thomas v. United States*, 890 F.2d 18, 21 (7th Cir. 1989), *aff'g* 671 F. Supp. 15, 16 (E.D. Wis. 1987).

The present state of the law allows for three different applications of Section 6103 regarding disclosure of return information that is in the

public record regardless if the disclosure is excepted under the law.

The Fourth circuit in *Mallas*, supra and the Tenth circuit in *Rodgers*, supra have held that there is no exception permitting the disclosure of return information simply because it is otherwise available to the public.

The Sixth circuit in *Rowley*, supra and the Ninth circuit in *Lampert*, supra have held that that a taxpayer may no longer claim a right of privacy of that information once return information is in the public record.

The Seventh circuit in *Thomas*, supra held no violation of Section 6103 occurs if the "immediate source is a public document lawfully prepared by an agency that is separate from the [IRS] and has lawful access to tax returns."

The Fifth circuit in *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997), adopted the "independent source" test, referred to in *Thomas*, supra, permitting the IRS to publicize information taken directly from court documents or records of public proceedings rather than from IRS files.

Petitioners believe that the plain language of Section 6103 precludes making any distinction between sources of return information in the public record. Congress has provided that:

> "Returns and return information shall be confidential, and except as authorized by this title--
>
> (1) no officer or employee of the United States...
>
> shall disclose any return or return information obtained by him in any manner in connection with his service

as such an officer or an employee or otherwise or under the provisions of this section.

The phrase "obtained by him in any manner" means what it says. This is a broad phrase that encompasses any mode, method, or source in obtaining return information.

The definition of return information makes no distinction between private information and public information or sources. Further, the statute does not address privacy concerns or issues. The thrust of Section 6103 is confidentiality. The information obtained by an Internal Revenue official is to be held in confidence or trust regardless of the source.

## ARGUMENT

### QUESTION 2

The basis for the petition is found at Rule 10(a) of the Supreme Court Rules.

The Supreme Court defined "good faith" immunity is an "affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) citing *Gomez v. Toledo*, 446 U.S. 635(1980).

Further, the Supreme Court in *Gomez* at 641 stated that:

> "Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. (Citations omitted.) Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ. Proc. 8 (c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure 1271 (1969). It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful."

Good faith immunity pursuant to 26 USC §7431(b) is an affirmative defense that must be pled and preserved by the government in its initial response to the allegation that an unauthorized disclosure has occurred. If good faith is not preserved the government is precluded asserting good faith in a subsequent pleading.

Good faith immunity from liability as codified at §7431(b) is not analogous to sovereign immunity from suit such as Federal Tort Claims Act limitations to certain causes of actions or jurisdiction derived from a limitation of action statute.

In *Harlow* the Court ruled "reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of

government and permit the resolution of many insubstantial claims on summary judgment."

Petitioners agree with the above objective standard as applied to good faith under Section 7431. However, allowing the United States to disregard the rules of procedure by not notifying the Plaintiffs of a good faith defense as a matter of law works an injustice to the Plaintiffs.

If government is given the benefit of the objective standard to avoid excessive disruption of government, then the taxpayer should have the benefit of the rules to avoid unnecessary expense of resources pursuing noticed defenses and then lose any right of recovery of those resources based upon a new defense or sovereign immunity.

## CONCLUSION

Taxpayers in Texas should have the same rights as taxpayers in Virginia or New Mexico under Section 6103. Section 6103 is not preempted or controlled by state privacy laws. Application should be uniform throughout the United States. For this reason, the petition should be granted.

The petition should be granted to resolve the question of good faith immunity as an affirmative defense and the government's burden under the rules of procedure in pleading good faith.

## APPENDIX

## RELEVANT STATUTE
(in part)

26 USC Sec. 6103. Confidentiality and disclosure of returns and return information

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6) or (12) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

26 USC Sec. (b)(2) Return information

The term "return information" means--

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

26 USC Sec. (b)(8) Disclosure

The term "disclosure" means the making known to any person in any manner whatever a return or return information.